SUMMARY OF MAJOR DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 2004

In *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), AWA Docket No. 03-0013, decided by the Judicial Officer on October 1, 2003, the Judicial Officer affirmed the Default Decision issued by Administrative Law Judge Marc R. Hillson (ALJ) finding that Respondents McQuary and Jones violated the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act as alleged in the Complaint, ordering Respondents McQuary and Jones to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assessing Respondents McQuary and Jones an $8,800 civil penalty, revoking Respondents McQuary's and Jones' Animal Welfare Act license, and disqualifying Respondent McQuary and Jones from obtaining Animal Welfare Act licenses. The Judicial Officer deemed Respondent McQuary's and Respondent Jones' failures to file timely answers admissions of the allegations in the Complaint and waivers of hearing (7 C.F.R. §§ 1.136(c), .139).

In *In re Belinda Atherton, d/b/a Bel-Kay Kennel* (Order Denying Late Appeal), AWA Docket No. 03-0005, decided by the Judicial Officer on October 20, 2003, the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Marc R. Hillson's Decision and Order Upon Admission of Facts by Reason of Default became final.

In *In re Geo. A. Heimos Produce Company, Inc.*, PACA Docket No. D-99-0016, decided by the Judicial Officer on October 29, 2003, the Judicial Officer suspended Respondent's PACA license for making false statements, for a fraudulent purpose, in connection with transactions involving perishable agricultural commodities in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Judicial Officer found that Respondent's employee or employees, acting within the scope of their employment, altered four United States Department of Agriculture (USDA) inspection certificates for fraudulent purposes. The Judicial Officer concluded that, as a matter of law, Respondent was responsible for its employees' violations (7 U.S.C. § 499p). The Judicial Officer reversed the Chief ALJ's assessment of an $8,000 civil penalty stating that Respondent's violations were egregious violations, which, after an examination of all relevant circumstances, warranted a 48-day suspension of Respondent's PACA license, and that an $8,000 civil penalty was not sufficient to deter future violations of the PACA. The Judicial Officer found the Chief ALJ erroneously considered the detrimental effect on Respondent of a PACA license suspension when he assessed an $8,000 civil penalty against Respondent. However, in light of Complainant's recommendation in favor of a civil penalty, the number of Respondent's violations, the period during which the

violations occurred, and the mitigating circumstances, the Judicial Officer gave Respondent the option of paying a $98,400 civil penalty, which the Judicial Officer found to have an equivalent deterring effect of a 48-day suspension of Respondent's PACA license. The Judicial Officer rejected Respondent's contention that Respondent was financially responsible stating that Respondent's willful alterations of USDA certificates resulting in losses of $8,238.26 to Respondent's produce suppliers established that Respondent is not financially responsible. The Judicial Officer also rejected Respondent's contention that Respondent was not unscrupulous stating the willful alterations of USDA inspection certificates are unscrupulous acts. The Judicial Officer concluded that each of Respondent's violations continued from the time Respondent made the false statement for a fraudulent purpose until Respondent informed the recipient of the false statement that the statement was in fact false and provided the recipient of the false statement with a correct statement.

In *In re Lion Raisins, Inc.*, 2002 AMA Docket No. F&V 989-5, decided by the Judicial Officer on December 4, 2003, the Judicial Officer vacated Administrative Law Judge Leslie B. Holt's (ALJ) Order Granting Motion to Dismiss and remanded the proceeding to the ALJ to provide Petitioner with an opportunity to respond to Respondent's Motion to Dismiss Amended Petition. The Judicial Officer found that the Hearing Clerk had not served Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the applicable rules of practice (7 C.F.R. § 900.69(b)).

In *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026, decided by the Judicial Officer on December 16, 2003, the Judicial Officer published the facts and circumstances of Respondent's willful, repeated, and flagrant violations of the PACA. The Judicial Officer concluded that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for perishable agricultural commodities and by Respondent's employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with inspections of perishable agricultural commodities. The Judicial Officer concluded that, as a matter of law, Respondent was responsible for its employee's violations (7 U.S.C. § 499p). The Judicial Officer held that administrative law judges have authority under the Rules of Practice (7 C.F.R. § 1.144(c)) to place evidence under seal to restrict access to the evidence. Finally, the Judicial Officer held that Respondent's produce sellers' acceptance of partial payment in full satisfaction of the produce debt does not constitute full payment in accordance with the PACA.

In *In re Erica Nicole Mashburn* (Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ), AWA Docket No. 03-0010, decided by the Judicial Officer on January 15, 2004, the Judicial Officer dismissed

Complainant's appeal from an order by Administrative Law Judge Jill S. Clifton denying Complainant's motion for a default decision. The Judicial Officer found that Complainant's appeal was interlocutory and held that Complainant's interlocutory appeal must be dismissed because the Rules of Practice (7 C.F.R. §§ 1.130-.151) do not permit interlocutory appeals.

In *In re Erica Nicole Mashburn* (Order Vacating Order Dismissing Interlocutory Appeal as to James Mashburn), AWA Docket No. 03-0010, decided by the Judicial Officer on January 21, 2004, the Judicial Officer vacated the January 15, 2004, Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ in which the Judicial Officer held that Complainant's appeal of an order by Administrative Law Judge Jill S. Clifton denying Complainant's motion for a default decision was premature. The Judicial Officer held that 7 C.F.R. § 1.139 provides that a complainant may appeal an administrative law judge's denial of a motion for a default decision to the Judicial Officer.

In *In re Lion Raisins, Inc.*, 2002 AMA Docket No. F&V 989-1, decided by the Judicial Officer on January 22, 2004, the Judicial Officer affirmed Administrative Law Judge Leslie B. Holt's Order denying Respondent's Motion to Dismiss Amended Petition. The Judicial Officer rejected Respondent's contention that Petitioner's Amended Petition did not comply with the requirements in 7 C.F.R. § 900.52(b)(3)-(5). The Judicial Officer found that Petitioner's Amended Petition substantially complied in form and content with the requirements in 7 C.F.R. § 900.52(b).

In *In re Erica Nicole Mashburn* (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn), AWA Docket No. 03-0010, decided by the Judicial Officer on February 3, 2004, the Judicial Officer vacated Administrative Law Judge Jill S. Clifton's (ALJ) Order denying Complainant's motion for a default decision as to Respondent James Mashburn. The Judicial Officer found that Respondent James Mashburn failed to file an answer to Complainant's Amended Complaint and failed to file objections to Complainant's motion for a default decision. The Judicial Officer concluded that under the circumstances, the ALJ was required, pursuant to 7 C.F.R. § 1.139, to issue a decision as to Respondent James Mashburn without further procedure or hearing. The Judicial Officer remanded the proceeding to the ALJ to issue a decision as to Respondent James Mashburn in accordance with the Rules of Practice.

In *In re Lion Raisins, Inc.* (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order), I & G Docket No. 03-0001, decided by the Judicial Officer on February 9, 2004, the Judicial Officer vacated Administrative Law

Judge Jill S. Clifton's (ALJ) ruling denying Complainant's motion for a default decision. The Judicial Officer found that Respondents failed to file an answer to the Complaint and failed to file meritorious objections to Complainant's motion for a default decision. The Judicial Officer concluded that under the circumstances, the ALJ was required, pursuant to 7 C.F.R. § 1.139, to issue a decision without further procedure or hearing. The Judicial Officer remanded the proceeding to the ALJ to issue a decision in accordance with the Rules of Practice.

In *In re Post & Taback, Inc.* (Order Denying Petition to Reconsider), PACA Docket No. D-01-0026, decided by the Judicial Officer on February 13, 2004, the Judicial Officer denied Respondent's petition to reconsider. The Judicial Officer concluded that the doctrine of res judicata does not preclude Complainant from bring a disciplinary action against Respondent for failure to pay produce sellers where Respondent's produce sellers brought a prior action against Respondent for non-payment and Respondent paid the judgment rendered against it. The Judicial Officer also found that the record contained substantial evidence that one of Respondent's employees bribed a United States Department of Agriculture inspector and Respondent failed to rebut that evidence. The Judicial Officer concluded that, as a matter of law (7 U.S.C. § 499p), Respondent was responsible for its employee's violations of the PACA.

In *In re Joel Taback*, PACA-APP Docket No. 02-0002, decided by the Judicial Officer on February 27, 2004, the Judicial Officer reversed Chief Administrative Law Judge James W. Hunt's decision holding that Joel Taback (Petitioner) was not responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The Judicial Officer concluded that during the period March 29, 1999, through August 1999, and during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., violated 7 U.S.C. § 499b(4). Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The Judicial Officer found that, while Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Post & Taback, Inc.'s violations, Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, director, and shareholder of Post & Taback, Inc., or that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc. Thus, the Judicial Officer concluded Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA.

In *In re Procacci Brothers Sales Corporation*, 2004 AMA Docket No. F&V 966-1, decided by the Judicial Officer on March 2, 2004, the Judicial Officer denied Petitioners' application for interim relief based upon established precedent. The Judicial Officer

stated he has consistently denied applications for interim relief from marketing orders because interim relief would work in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief.

In *In re Excel Corporation* (Order Denying Petitions for Reconsideration), P. & S. Docket No. D-99-0010, decided by the Judicial Officer on March 26, 2004, the Judicial Officer denied Complainant's petition for reconsideration and Respondent's petition for reconsideration and ordered Respondent, in connection with its purchase of livestock on a carcass merit basis, to cease and desist from failing to make known to livestock sellers the factors that affect Respondent's estimation of lean percent. The Judicial Officer rejected Complainant's contention that a substantial civil penalty was warranted, stating that, based on the unique circumstances in the proceeding, a cease and desist order is sufficient to deter Respondent and other packers from future violations of 9 C.F.R. § 201.99(a). The Judicial Officer rejected Respondent's contention that the cease and desist order was too broad. The Judicial Officer stated a cease and desist order need only bear a reasonable relation to the unlawful practice found to exist and the power to issue a cease and desist order is not limited to proscribing only the precise unlawful practice found to exist, but includes power to prohibit variations of the unlawful practice to prevent the practice from reappearing in a slightly altered form. The Judicial Officer also rejected Respondent's contention that section 202(a) of the 21st Century Department of Justice Appropriations Authorization Act (28 U.S.C. § 530D) requires that the cease and desist order expire after no longer than 3 years. Further, the Judicial Officer rejected Respondent's contentions that its violations of 9 C.F.R. § 201.99(a) were not grave and did not impede competition.

In *In re Winifred M. Canavan, d/b/a Westport Aquarium*, AWA Docket No. 03-0003, decided by the Judicial Officer on April 20, 2004, the Judicial Officer remanded the proceeding to the Acting Chief Administrative Law Judge for assignment to an administrative law judge to rule on the parties' joint motion to modify a consent decision entered by the former Chief Administrative Law Judge who retired from federal service effective August 1, 2003. The Judicial Officer, citing 7 C.F.R. § 1.143(a), held, because no appeal had been filed and the joint motion did not relate to an appeal, an administrative law judge, rather than the Judicial Officer, must rule on the joint motion.

In *In re Massachusetts Independent Certification, Inc.*, OFPA Docket No. 03-0001, decided by the Judicial Officer on April 27, 2004, the Judicial Officer concluded he did not have jurisdiction over the proceeding in which Petitioner, a certifying agent under the Organic Foods Production Act of 1990, as amended (7 U.S.C.

§§ 6501-6522), and the National Organic Program (7 C.F.R. pt. 205), appealed a decision by the Administrator sustaining an applicant's appeal of Petitioner's denial of organic certification. Based on his lack of jurisdiction, the Judicial Officer dismissed Petitioner's appeal.

In *In re Joel Taback* (Order Denying Petition for Reconsideration), PACA-APP Docket No. 02-0002, decided by the Judicial Office on April 28, 2004, the Judicial Officer denied Petitioner's petition to reconsider. The Judicial Officer rejected Petitioner's contentions that the Judicial Officer was bound to adopt the Chief Administrative Law Judge's findings of fact and that the Judicial Officer's decision in *In re Joel Taback*, 63 Agric. Dec. ___ (Feb. 27, 2004), was error.

In *In re Benjamin Sudano*, PACA-APP Docket No. 02-0001, decided by the Judicial Officer on May 21, 2004, the Judicial Officer affirmed Chief Administrative Law Judge James W. Hunt's decision holding that Benjamin Sudano and Brian Sudano (Petitioners) were responsibly connected with Lexington Produce Co. when Lexington Produce Co. violated the PACA. The Judicial Officer concluded that, during the period May 1999 through January 2000, Lexington Produce Co. violated 7 U.S.C. § 499b(4). During the violation period, Benjamin Sudano was the vice president, secretary, and holder of 50 percent of the outstanding stock of Lexington Produce Co. and Brian Sudano was the president, treasurer, and holder of 50 percent of the outstanding stock of Lexington Produce Co. Petitioners failed to prove by a preponderance of the evidence that: (1) they were not actively involved in the activities resulting in Lexington Produce Co.'s PACA violations; and (2) they were only nominally officers and shareholders of Lexington Produce Co. or they were not owners of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co. The Judicial Officer found that, during part of the violation period, Petitioners shared control over Lexington Produce Co. with John Alascio, but that, even during this period of shared control, Petitioners were responsibly connected with Lexington Produce Co.

In *In re Lion Raisins, Inc.*, I&G Docket No. 03-0001, decided by the Judicial Officer on May 24, 2004, the Judicial Officer issued a Default Decision finding Respondents violated the Agricultural Marketing Act and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52). The Judicial Officer concluded Respondents had not filed a timely answer to the Complaint. Respondents objected to Complainant's motion for default decision on the ground that Respondents' motion to dismiss constituted a timely response to the Complaint. The Judicial Officer found Respondents' objection lacked merit stating a motion to dismiss is not a responsive pleading and Respondents' motion to dismiss did not meet the

requirements for an answer under 7 C.F.R. § 1.136(b). The Judicial Officer further stated, under 7 C.F.R. § 1.143(b)(1), a motion to dismiss cannot be entertained.

In *In re David McCauley* (Order Denying Late Appeal), AWA Docket No. 02-0010, decided by the Judicial Officer on July 12, 2004, the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Marc R. Hillson's decision became final.

In *In re Ross Blackstock* (Order Denying Late Appeal), FCIA Docket No. 02-0007, decided by the Judicial Officer on July 13, 2004, the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Chief Administrative Law Judge Marc R. Hillson's decision became final.

In *In re Lion Raisins, Inc.*, I&G Docket No. 01-0001 (Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion), decided by the Judicial Officer on July 28, 2004, the Judicial Officer dismissed an interlocutory appeal from a ruling by Administrative Law Judge Jill S. Clifton on the ground that interlocutory appeals are not permitted under the Rules of Practice.

In *In re Eddie Robinson Squires*, A.Q. Docket No. 02-0005, decided by the Judicial Officer on August 9, 2004, the Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's Default Decision finding that Respondent violated 21 U.S.C. §§ 111 and 120 (repealed 2002) and 9 C.F.R. pts. 71 and 78 (1999) when he moved cattle and swine interstate without required identification and documents and failed to keep records. The Judicial Officer rejected Respondent's contention that his lack of actual knowledge of 21 U.S.C. §§ 111 and 120 (repealed 2002) and 9 C.F.R. pts. 71 and 78 (1999) is a defense to the violations. The Judicial Officer stated Respondent is presumed to know the law and publication of the regulations in the Federal Register constructively notifies Respondent of the regulations. The Judicial Officer held that Respondent failed to prove that he was the target of selective enforcement. Citing the general savings statute (1 U.S.C. § 109), the Judicial Officer rejected Respondent's contention that no action could be brought against him for his 1997 and 1998 violations of 21 U.S.C. §§ 111 and 120 (repealed 2002) because those provisions of law were repealed by the Farm Security and Rural Investment Act of 2002 effective May 13, 2002. The Judicial Officer also stated that Respondent's cessation of activities resulting in his violations is not a defense to past violations. The Judicial Officer further rejected Respondent's contention that his substantial familial responsibilities are a defense to his violations. Finally, the

Judicial Officer found that, while the inability to pay a civil penalty is a mitigating circumstance in animal quarantine cases, the Respondent has the burden of proving an inability to pay and Respondent failed to meet his burden of proof.

In *In re Erica Nicole deHaan* (Decision as to Erica Nicole deHaan), AWA Docket 04-0004, decided by the Judicial Officer on August 18, 2004, the Judicial Officer affirmed two decisions issued by Administrative Law Judge Jill S. Clifton finding that Erica Nicole deHaan (Respondent) operated as a dealer, as defined in 7 U.S.C. § 2132(f) and 9 C.F.R. § 1.1, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1). The Judicial Officer held, pursuant to 7 U.S.C. § 2149(b), each dog Respondent sold and each day during which Respondent sold dogs without an Animal Welfare Act license constituted a separate violation, and the Judicial Officer increased the $3,840 civil penalties assessed against Respondent by the ALJ to $18,000. The Judicial Officer stated Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). In addition, the Judicial Officer based the decision on Respondent's admissions, during a teleconference with the ALJ and counsel for Complainant, that she committed violations alleged in the Complaint to have been committed by another respondent.

In *In re David McCauley* (Order Denying Petition for Reconsideration), AWA Docket No. 02-0010, decided by the Judicial Officer on September 2, 2004, the Judicial Officer denied Respondent's petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal, as required by 7 C.F.R. § 1.146(a)(3).

In *In re Vega Nunez* (Order Denying Late Appeal), A.Q. Docket No. 03-0002, decided by the Judicial Officer on September 8, 2004, the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded he had no jurisdiction to hear Respondent's appeal filed on the day Administrative Law Judge Jill S. Clifton's decision became final.

In *In re Unified Western Grocers, Inc.*, AMA Docket No. M-1131-1, decided by the Judicial Officer on September 20, 2004, the Judicial Officer affirmed the decision by Administrative Law Judge Jill S. Clifton (ALJ) dismissing the Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer concluded, since Dairy Institute of California was not a handler, it did not have standing to file a petition under 7 U.S.C. § 608c(15)(A). The Judicial Officer rejected the other Petitioners' contentions that the failure to grant them the same exemption from the Arizona-Las Vegas Milk Marketing Order (7 C.F.R. pt. 1131) as Congress granted to a handler at a plant operating in Clark

County, Nevada (7 U.S.C. § 608c(11)(C)), violates: (1) the prohibition on trade barriers in 7 U.S.C. § 608c(5)(G); (2) the Secretary of Agriculture's duty in 7 U.S.C. § 608c(16)(A) to terminate provisions of marketing orders which obstruct or do not effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937; and (3) the equal protection provisions of the Fifth Amendment to the United States Constitution.